

24TH Federal Litigation

Discovery Seminar Materials

Seminar vignette:

Pamela Peterson is the 17-year-old daughter of a medically retired – and now deceased – Air Force officer. When she was 16, Pamela suffered a tear of the meniscus in her right knee during high school basketball practice. She was seen at a medical clinic at Fort Meade and scheduled for arthroscopic surgery to repair it.

LTC (Dr.) Farrington Pearl, III, a board certified orthopedic surgeon, performed the arthroscopy. According to LTC Pearl, the operation was uneventful and he noticed no problems during surgery. The procedure was also recorded by digital videography on the hospital's information system.

While Pamela was in post-operative recovery, she began complaining about excruciating pain in her foot and calf. MAJ (RN) Lemaire Farris dismissed Pamela's complaints as ordinary post-operative pain amplified through the psyche of a teenager. Four hours post-operatively, nurses were unable to detect a pedal pulse in Pamela's right leg. Subsequent evaluation disclosed that Pamela was suffering compartment syndrome in her right calf. An emergent fasciotomy was performed to relieve the pressure. Vascular studies were also performed. These identified a defect in the femoral artery at the level of the knee.

Shortly after the severed artery was detected, emergency vascular surgery was performed to repair the artery. Unfortunately, Pamela suffered a nerve injury secondary to compartment syndrome in her right calf which left her with a foot drop and permanent partial disability in her right leg. Her right leg is also significantly scarred.

Pamela's mother, Mrs. Lynette Peterson, retained Bart Fitzhugh, a former Army JAG, to represent her in the litigation. Bart filed an administrative claim and, after the 6 month period elapsed, filed an action against the United States in the U.S. District Court for the District of Maryland, claiming damages of \$15 million.

Your review of the WWW page for the local paper notes that last year (Pamela's junior year in high school), she was named to the all-county basketball team as well as the academic all-state team. The article notes that she was being recruited by the University of Maryland, Georgetown, the Naval Academy and Notre Dame. It also claimed she was ranked third in her high school class (of 643 students).

You have worked closely with the AUSA on several previous cases. She's overworked and underpaid and, having seen your prior work product, increasingly receptive to your substantial participation in this case. In fact, in your first phone call with her, the AUSA informs you that discovery in this case "is your baby."

You interview LTC Pearl (who was recently reassigned to Heidelberg, FRG) by telephone. LTC Pearl informs you that he does not believe that he severed the patient's femoral artery, but he has no good explanation for how the injury occurred. He reports being involved in two other FTCA claims. One was never the subject of any litigation; the other resulted in a nuisance (\$50,000) payment. The first claim involved an alleged failure (by LTC Pearl) to diagnose a wrist fracture in an adult patient. He had seen the patient in clinic and referred the patient to a radiologist who misread the film. The admin claim asserted that LTC Pearl failed to diagnose the fracture, but provided no additional details. No litigation was pursued. The second claim asserted that LTC Pearl avulsed a nerve root while performing a hemi-laminectomy (spine surgery) on another adult patient. LTC Pearl was the attending physician at WRAMC for this patient, but a senior resident, not LTC Pearl, actually performed the surgery. Pearl asserts that he was named because he was the attending. He also alleges that the payment was made only because the senior resident had some "personality issues" and the AUSA in that case was afraid to take the case to trial.

LTC Pearl informs you that the digital video recordings of arthroscopies were routinely destroyed several weeks after the procedure (they were actually overwritten by other procedures). Occasionally, the patient would request a videotape recording of his or her surgery and, if the patient supplied a tape, these would be made contemporaneously with the digital version. LTC Pearl is aware that the morbidity and mortality committee reviewed the digital recording, excerpted certain frames and included these in a committee report. He does not believe that they maintained a copy of the complete recording. Your conversation with the risk manager of the hospital confirmed that the entire recording was destroyed, but that that committee retained certain frames, which were of particular interest to them.

MAJ Lemaire Farris left the Army shortly after the Peterson surgery. While he was a competent OR nurse, it seems he had difficulty keeping his hands off of some of the female employees in the hospital. In fact, two female civilian nurses brought a sexual harassment claim against the Army based, in large part, on the misconduct of MAJ Farris. The case was tried in the District Court for the District of Columbia and resulted in a \$250,000 award. The case made headlines in the Washington Post (Metro section) on at least 3 days.

Seminar Exercise No. 1:

Fashion – and be prepared to articulate – your strategy for the Rule 26(f) conference. Assume that the court will set trial in August 2005.

Seminar Exercise No. 2:

Prepare objections and answers to plaintiff's first interrogatories. For any interrogatories for which you are unable to provide a substantive response, provide a plan of action to acquire the necessary information.

Seminar Exercise No. 3:

Prepare correspondence replying to Bart Fitzhugh's notice of deposition. Your letter should preserve objections and comply with your duty to attempt to resolve any discovery difficulties without court intervention.

Seminar Exercise No. 4:

Draft a request for production to the plaintiff consisting of at least four requests.

Seminar Exercise No. 5:

Identify six areas of questioning to be explored with the plaintiff (Pamela) and briefly outline the questions to be asked in each area.

Seminar Exercise No. 6:

Draft five interrogatories to be addressed to the plaintiff, at least one of which is a contention interrogatory.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division**

PAMELA PETERSON, a minor, by her next friend))	
and guardian, LYNETTE PETERSON,)	
)	
Plaintiff)	
)	
)	
v.)	Civil Action No. 04:cv1459
)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

**PLAINTIFF'S FIRST INTERROGATORIES
TO DEFENDANT UNITED STATES OF AMERICA**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, plaintiff requests that defendant United States of America answer the following interrogatories within 30 days after service of this document.

PRELIMINARY INSTRUCTIONS

- A. Defendant's responses to these interrogatories must include matters within defendant's personal knowledge as well as those matters within the possession of, or obtainable by, defendant, defendant's attorney(s), investigators, representatives, or anyone acting on behalf of either defendant or defendant's attorney(s).
- B. These interrogatories are to be regarded as continuing and you must provide, by way of supplementary responses, such additional information as may hereafter be obtained by you or any person acting on your behalf, stating the basis upon which you now know that the prior responses or answers were incomplete, incorrectly made or whether correctly made are no longer true. Such supplementary answers are to be filed and served within 15 days after receipt of such information, but not later than the time of trial.

- C. If any of these interrogatories cannot be answered in full, you must answer to the fullest extent possible and provide an explanation for your inability to respond more fully.
- D. For each interrogatory for which a response is provided, identify each and every individual who provided information or assistance in preparing the response.
- E. For each interrogatory for which a response is provided, identify each document which was considered, reviewed, or evaluated in preparing the response and attach any such documents identified.
- F. For any interrogatory to which you assert an objection, describe fully the grounds for objection sufficiently that the Court and the plaintiff can understand, assess and evaluate the basis for the assertion of the objection. If such objection concerns a document, identify each such document.

DEFINITIONS

- a. The term “health care provider” as used in this request includes every physician, nurse, corpsman, medical technician, medical student, physician’s assistant, and all other persons providing medical care.
- b. The term “you” refers to the defendant United States of America and where the context permits, its attorneys, agents and employees.
- c. Document as used in these interrogatories should be construed in its broadest sense and means:
 - (1) all writings of any kind, including the originals and all non-identical copies, whether different from the originals by reason of any notation made on such copies or otherwise, including without limitation, correspondence, memoranda, notes, worksheets, diaries, statistics, letters, telegrams, telex, telefax, minutes, contracts, reports, studies, checks, statements, receipts, returns, summaries, pamphlets, books, notations of any sort regarding conversations, telephone calls, meetings or other communications, bulletins, printed matter of any kind and all forms of drafts, notations, markings, alterations, modifications, changes and amendments of any of the foregoing;
 - (2) graphical or aural records or representations of any kind, (including, without limitation, photographs, charts, x-rays or other radiographic images, graphs, videotape, recordings and motions pictures), and the electronic, mechanical or electrical records or representations of any kind (including, without limitation, tapes, cassettes, discs and recordings).

- d. To “identify” a person means to state his or her full name, current or last known business address, telephone number, employer, and job position and title or rank at all times material to the occurrences giving rise to the Complaint.
- e. To “identify” an entity or organization, means to indicate the name, address of its principal facility or facilities, telephone number and to identify the general manager or other person affiliated with the entity or organization who has supervisory responsibilities for the entity or organization.
- f. To “identify” a document means to set forth the general nature of the document (i.e. whether it is a letter, memorandum, report, etc.), to identify its author, recipients, and its present custodian, and to provide its date of preparation.
- g. To “describe” means to provide a comprehensive, full, frank, complete, accurate, and detailed explanation of the matter inquired of, so as to relay all significant responsive information known or believed to exist concerning the matter by the person(s) responding.

INTERROGATORIES

Interrogatory No. 1: Set forth in complete detail how you contend the plaintiff’s femoral artery was severed, indicating the precise mechanism by which it was severed, the time and date it was severed, any surgical tools or instruments which were being applied at the time that it was severed and identify the person(s) who were manipulating or using such tools or instruments at the time the artery was severed.

Answer:

Interrogatory No. 2: Identify each expert witness you have consulted or who you may call at trial. For each such expert, set forth his qualifications, state the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify, and state a summary of the grounds for each opinion.

Answer:

Interrogatory No. 3: Identify each and every action in which any of the following were defendants and identify every claim or judgment paid, the basis for which was, in whole or in part, negligence or misconduct by any of the following:

- (a) Lieutenant Colonel Farrington Pearl, III, M.D.
- (b) Major Lemaire Farris, R.N.

Answer:

Interrogatory No. 4: Identify each and every person likely to have discoverable information relevant to disputed facts alleged in the Complaint, separately setting forth the subject of the information about which each person identified has knowledge.

Answer:

Interrogatory No. 5: Identify each and every document you contend supports your allegation that LTC Pearl was not negligent in performing arthroscopic surgery on Pamela Peterson.

Answer:

Respectfully submitted,

Bart Fitzhugh, Esquire
The People's Law Firm, PLLC
1212 W. Broad Street
Baltimore, MD 21200

CERTIFICATE

The undersigned certifies that the foregoing document was forwarded by telecopier and first class mail, postage prepaid to Janice W. Burnside, Assistant U.S. Attorney, District of Maryland, Baltimore MD 21119 this 30th day of July 2004.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division**

PAMELA PETERSON, a minor, by her next friend))	
and guardian, LYNETTE PETERSON,)	
)	
Plaintiff)	
)	
)	
v.)	Civil Action No. 04:cv1459
)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
_____)	

NOTICE OF DEPOSITION

Please take notice that, in accordance with Federal Rule of Civil Procedure 30(b)(6), the deposition upon oral examination of Lieutenant Colonel Farrington Pearl, III, M.D., U.S. Army, will be taken before an officer authorized to administer oaths at the law offices of The People's Law Firm, PLLC, 1212 W. Broad Street, Fayetteville, NC 27888, beginning at 10:00 a.m., August 9, 2003 and continuing from day to day until completed.

The matters upon which LTC Pearl will be questioned will include, but are not limited to:

- a. the arthroscopic surgery performed on Pamela Peterson;
- b. the techniques for arthroscopic surgery;
- c. informed consent;
- d. the risks attendant to arthroscopic surgery;
- e. LTC Pearl's training and experience in arthroscopic surgery.

YOU ARE INVITED TO ATTEND AND PARTICIPATE AS YOU SEE FIT.

Respectfully submitted,

Bart Fitzhugh, Esquire
The People's Law Firm, PLLC
1212 W. Broad Street
Baltimore, MD 21200

CERTIFICATE

The undersigned certifies that the foregoing document was forwarded by telecopier and first class mail, postage prepaid to Janice W. Burnside, Assistant U.S. Attorney, District of Maryland, Baltimore, MD 21119 this 30th day of July 2004.

Section 1102. Confidentiality of medical quality assurance records: qualified immunity for participants

- (a) **Confidentiality of Records.** - Medical quality assurance records created by or for the Department of Defense as part of a medical quality assurance program are confidential and privileged. Such records may not be disclosed to any person or entity, except as provided in subsection (c).
- (b) **Prohibition on Disclosure and Testimony.** - (1) No part of any medical quality assurance record described in subsection (a) may be subject to discovery or admitted into evidence in any judicial or administrative proceeding, except as provided in subsection (c). (2) A person who reviews or creates medical quality assurance records for the Department of Defense or who participates in any proceeding that reviews or creates such records may not be permitted or required to testify in any judicial or administrative proceeding with respect to such records or with respect to any finding, recommendation, evaluation, opinion, or action taken by such person or body in connection with such records except as provided in this section.
- (c) **Authorized Disclosure and Testimony.** - (1) Subject to paragraph (2), a medical quality assurance record described in subsection (a) may be disclosed, and a person referred to in subsection (b) may give testimony in connection with such a record, only as follows:
 - (A) To a Federal executive agency or private organization, if such medical quality assurance record or testimony is needed by such agency or organization to perform licensing or accreditation functions related to Department of Defense health care facilities or to perform monitoring, required by law, of Department of Defense health care facilities.
 - (B) To an administrative or judicial proceeding commenced by a present or former Department of Defense health care provider concerning the termination, suspension, or limitation of clinical privileges of such health care provider.
 - (C) To a governmental board or agency or to a professional health care society or organization, if such medical quality assurance record or testimony is needed by such board, agency, society, or organization to perform licensing, credentialing, or the monitoring of professional standards with respect to any health care provider who is or was a member or an employee of the Department of Defense.
 - (D) To a hospital, medical center, or other institution that provides health care services, if such medical quality assurance record or testimony is needed . . . to assess the professional qualifications of any health care provider . . .
 - (E) To an officer, employee, or contractor of the Department of Defense . . .
 - (F) To a criminal or civil law enforcement agency . . .
 - (G) In an administrative or judicial proceeding commenced by a criminal or civil law enforcement agency

. . . .

(h) **Application to Information in Certain Other Records.** - Nothing in this section shall be construed as limiting access to the information in a record created and maintained outside a medical quality assurance program, including a patient's medical records, on the grounds that the information was presented during meetings of a review body that are part of a medical quality assurance program.